Nos. 87-1622, 87-1697, and 87-1711

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PHILIP BRENDALE,
Petitioner,
v.
CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, *et al.*,
Respondents.

STANLEY WILKINSON,
Petitioner,
v.
CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION,
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COUNTY OF YAKIMA, *et al.*,
Petitioners,
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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF OF PETITIONER COUNTY OF YAKIMA

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ARGUMENT

I. YAKIMA COUNTY IS ENTITLED TO BE HEARD ON THE ISSUES *WHITESIDE I* RAISES.

The Tribe has made it necessary to discuss the threshold question of whether the County has standing to address the issue of the County's land use regulation of "closed area" lands. The Tribe concludes from the County's strategic choice not to appeal *Whiteside I* that the "County was apparently satisfied with Judge Quackenbush's decision . . .", and that the County should not now be heard to argue that its zoning authority can be imposed in this area under a "bright line" test. *See* RB at 15 n.11. This assertion is neither factually accurate nor legally relevant.

This assertion is flatly incorrect because the County was not ever satisfied with the District Court's decision in *Whiteside I*, and the Tribe cannot point to any part of the record where the County expressed its alleged satisfaction. Obviously, satisfaction with the result is not the only reason for not appealing a trial court decision. There were tactical, political, financial and other practical reasons for not appealing *Whiteside I*.

As the record indicates, Yakima County vigorously defended *Whiteside I*. The County carried the significant burden of discovery, briefing and presentation of evidence in that case. When confronted with the District Court's opinion, however, the County's candid assessment was that an appeal of *Whiteside I* would have little chance of success. In light of the District Court's reliance on an interpretation of *Montana* which the County shares, and the deference accorded trial court findings by Federal Rule of Civil Procedure 52(a), it appeared unlikely that the trial court's findings concerning the factual predicates for tribal jurisdiction would be overturned.

The County's decision not to appeal *Whiteside I* was a difficult one. In retrospect, it was a mistake, for the

Ninth Circuit adopted a view of *Montana* totally at odds with both the County's and the District Court's understanding. It determined that tribal jurisdiction to zone non-member fee lands in both the open and closed areas existed as a matter of law. As indicated in the County's Brief on the Merits, this reading of *Montana* causes the exception to swallow the rule and reduces that decision to a minor, aberrant opinion. It creates the danger that a significant number of Yakima County's citizens will be subject to a government in which they have no vote.

The Tribe's assertion is legally irrelevant because one of Yakima County's citizens, Philip Brendale, did preserve the closed area issue for review. Yakima County is a party to *Whiteside I* in the consolidated cases before this court just as it was below. As such, the County has the same right as any other party to advocate solutions to the problems presented by these cases. Indeed, in this instance, it has the duty to do, as it has become increasingly apparent that the rights of Yakima County citizens are at risk. Further, the April 8, 1988 ruling of the Assistant Secretary of Interior for Indian Affairs, holding the BIA's closure of roads into the closed area illegal, casts significant new light on the District Court's findings. *See Brendale Brief* at 1a-5a.

Moreover, there is no question of inconsistency that would prejudice the Tribe. The County's position is not at odds with its position below, but rather is substantively identical. The County has never maintained that it should be precluded from regulating closed area fee land or that the Tribe's interest in the closed area would not be protected by County zoning of the fee lands.[1]

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[1] The quotation of the Yakima County Prosecuting Attorney appearing on page 30 of the Tribe's brief is in the context of the County's Rule 41(b) Motion to Dismiss made at the close of the Tribe's case in *Whiteside II*. The entire transcript of the proceedings of the trial court on that motion begins at page 350 and ends on page 410. Obviously, it is misrepresentative to single out one

II. THE TRIBE ATTEMPTS TO RECAST THE RECORD IN ITS STATEMENT OF THE CASE.

A. The planned development provisions of the Tribal zoning ordinance do not constitute a subdivision regulation.

For the first time in these proceedings, the Tribe asserts that it regulates the subdivision of land on the reservation. (RB 7). The Tribe claims to accomplish this through implementation of the planned development provisions of its zoning ordinance. (JA 65-76). The Tribe's claims are contrary to the plain terms of the ordinance and in direct contradiction of the testimony of its own witnesses.

A planned development is a regulatory technique which allows a developer of a qualifying site to be free of otherwise applicable zoning regulations (i.e., setbacks, lot sizes, and even permitted uses) in exchange for submitting to a detailed, tailored regulation, the "development plan and program". The technique is widely used as a method of allowing flexibility to the otherwise strict requirements of a Euclidian zoning scheme. The public gains precise control since development must proceed in accordance with the approved site plan. *See Settle*, Washington Land Use and Environmental Practice, Sec. 2.12(c), p. 68 (1983); *See* also the purpose section of the Tribal planned development regulation (JA 65-66).

The Tribe implements its planned development provisions through a "floating zone". That is, the planned development district is included in the text, but not the map of the zoning ordinance. The regulatory provisions of the planned development district have no application to any specific parcel until attached to that parcel by the

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passage from eight days of trial held on the *Whiteside I* and *Whiteside II* cases. Further, the quotation must be read in its context—the County was therein arguing *after* the Court's decision in *Whiteside I*.

approval of a rezone application. *See* Sections 5 and 6 of the Tribal regulation (JA 68-69).

It is true, then, that a developer seeking relief from otherwise applicable provisions of the Tribal zoning ordinance might apply to have his property rezoned to planned development. However, a developer willing to comply with the zoning regulations of the applicable use district, specifically the minimum lot size, could subdivide his property without seeking a planned development rezone. Thus, the owner of 100 acres of land within the Tribe's "agricultural" use district could subdivide it into 20 five acre lots without Tribal review of any kind or the application of any development standards. Such was the testimony of Tribal Councilman Anthony Washines (WS II TR. 171-172). Interestingly, because of this, the Tribal land use expert, Keith Dearborn, was of the opinion that the procedures of the Washington Subdivision Act, RCW 58.17, should govern a proposed subdivision of fee land on the reservation. (WS II TR. 72).

B. The level of the County's land use activity on fee lands within the open area is commensurate with its stated goal of agricultural preservation.

The Tribe goes on to argue that the low level of county land use activity in the open area of the reservation somehow demonstrates the weakness of the County's arguments. The Tribe points out that the County has processed only "eight short plats per year"; "only one long plat per year", "fewer than six building permits per month"; and, that such regulatory activities constitute "only 6.4 percent of all matters worked on by the Yakima County Planning Department." (RB 8).[2]

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[2] The Tribe builds a straw man when it asserts that "all petitioners boldly argue that Yakima County has "exclusive" land use regulation to the fee lands of the Yakima Indian Reservation for thirty five years." (RB 8). Yakima County's brief make no such declaration. The Tribal zoning ordinance and the history of its application to fee lands in the open area are set forth in detail at pages 17-19 of the County Brief.

What the Tribe fails to note, however, is that the purpose of the County's zoning ordinance as applied to the fee lands of the open area is the preservation of agricultural land. Most of the fee lands within the open area are zoned "exclusive agricultural", the most restrictive use district in the County zoning ordinance. This use district permits only those uses which are compatible with agriculture and has a minimum lot size of forty acres. (County BR 15). The legislative intent of the County zoning scheme in the open area is to focus development away from these prime farm lands. (County BR 7). The low level of activity is precisely the intended result.

Finally, the Tribe apparently claims that it did provide exclusive land use regulation in the 317 applications by non-members which it has processed. The Tribe notes that none of the County's "list of horribles" has occurred as a result of its regulation of this land. (RB 9). However, there is absolutely nothing in the record to indicate that these applicants did not also receive County approval of their projects. As indicated, a Tribal building permit costs only $5.00 and entails no on-site inspection. (County BR 17). What is clear, from the different numbers of applications processed by the two governments, is that most fee land owners have sought only County approval of their projects.

C. The Tribe's characterization of county land use regulation in the closed area is inaccurate.

The Tribe states that prior to the Brendale project, the County had "never" attempted to exercise land use jurisdiction in the closed area. (RB 9). This ignores the fact that the adoption of the County zoning ordinance which mapped all of the fee lands in the closed area was an exercise of land use jurisdiction. Under the Tribe's analysis, the Tribe itself never attempted to exercise land use jurisdiction in the closed area until it objected to Brendale's development. A more precise statement is that Brendale's applications were the first the County

Planning Director was aware of in the closed area. The Planning Director's testimony does indicate active state regulation of logging activity on fee lands near the shorelines in the closed area. (WS I, TR 476).

Further, the Tribe states that Brendale's proposal is "permitted" under the County zoning ordinance. (RB 9). It is important to note that the County did not approve Brendale's proposal. The last action taken by the County prior to the commencement of the Tribe's lawsuit was to require the preparation of an environmental impact statement. Indeed, the findings of fact made by the Board of Yakima County Commissioners in requiring the preparation of an EIS were adopted by the District Court in rendering its decision. (Brendale App. 50).

III. THE EXISTENCE OF TRIBAL AND MEMBER OWNED FEE LAND WITHIN THE RESERVATION DOES NOT PREVENT THIS COURT FROM ADOPTING A "BRIGHT LINE" TEST.

The Tribe alleges that it and many enrolled members own fee lands outside of the incorporated cities in both the open and closed areas of the reservation. (RB 25).[3] The Tribe argues that because of the existence of these lands, this court would be prevented from fashioning a "bright line" test based upon land tenure since: (1) The County would have no regulatory jurisdiction over fee lands owned by members pursuant to *Seymour v. Su-*

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[3] Members of the Tribe own 67 parcels of land outside of the cities totaling approximately 1,335.68 acres. No breakdown between open and closed area ownership is available. These figures are taken from the stipulation between the County and the Tribe in the case of *Confederated Tribes and Bands of the Yakima Indian Nation v. County of Yakima, et. al.*, No. C-87-654-AAM. That case is currently on appeal to the Ninth Circuit, Docket No. 88-3929. This is the same stipulation referred to by the Tribe in its brief. (RB 8 n.7). The text of that portion of the stipulation concerning the extent of Tribal member fee ownership is reprinted in the appendix to this brief.

perintendent, 368 U.S. 351 (1962), and *Moe v. Salish and Kootenai Tribes*, 425 U.S. 463 (1976); and, (2) The County could not force the Tribe to comply with its zoning ordinance because of its sovereign immunity.

First, the Tribe's point concerning its sovereign immunity is correct, but irrelevant. Lands owned in fee by the Tribe, presumably for some governmental purpose, would be treated no differently than lands within the County owned by other sovereigns, i.e., the state or federal government. The County exercises no zoning jurisdiction over such lands absent consent by the sovereign owner. This is simply a general rule of law and is no impediment to the implementation of the County zoning scheme. Indeed, two-thirds of the County's total land area is in federal ownership. (WS II TR 546).

Second, the Tribe's reliance on *Seymour* and *Moe* for the proposition that County regulation of member owned fee lands could result in an impermissible pattern of checkerboard jurisdiction is unfounded. *Seymour* did assert that this view would require police officers to "search tract books" and that such an "impractical pattern of checkerboard jurisdiction" was contrary to the language of 18 U.S.C. 1151. 368 U.S. at 357. *See also, Moe*, 425 U.S. at 478.[4]

However, in 1963, pursuant to federal law, the State of Washington assumed partial criminal and civil jurisdiction over Indians and reservation lands pursuant to the provisions of PL 83-280, 22 USC 1162, 18 USC 1360. The State assumed full jurisdiction over Indians on fee

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[4] In *Moe*, Montana alleged that Section 6 of the General Allotment Act, 25 USC 349, gave it general authority to levy personal property and sales taxes on reservation Indians. This Court rejected that claim, noting that by its terms, Section 6 would only apply to fee lands. 425 U.S. 478. The court found that Montana's taxing authority was controlled by the same treaty terms and federal statutes discussed in *McClanahan v. Arizona*, 411 U.S. 164 (1973). 425 U.S. 480, 481.

lands but provided, with certain exceptions, that there would be no jurisdiction on trust lands absent a tribe's request. This Court upheld Washington's partial assumption of jurisdiction based upon land tenure in *Washington v. Confederated Tribes and Bands of the Yakima Indian Nations*, 439 U.S. 463 (1979). In so doing, this court cited both *Seymour* and *Moe* for the proposition that: "The lines the State has drawn may well be difficult to administer. But they are no more or less so than many of the classifications that pervade the law of Indian jurisdiction." 439 U.S. 502.

Seymour's broad assertion is, therefore, no longer controlling. Under the authority of *Washington*, an Indian owner of fee lands on the Yakima Reservation is subject to state criminal jurisdiction and state civil laws of general application in a lawsuit.

IV. A REMAND FOR A BALANCING OF COUNTY AND TRIBAL REGULATORY INTERESTS IN THE OPEN AREA IS UNNECESSARY.

The Tribe argues that if its attack on *Montana* fails, this court should affirm the Ninth Circuit's remand of *Whiteside II* for a balancing of competing County and Tribal regulatory interests. According to the Tribe, such a remand is necessary because the County allegedly failed to identify any off-reservation interest which would sustain its regulatory authority. (RB 31, 32). Such a remand is unnecessary for two reasons: (1) There is no legal authority requiring a showing of off-reservation impacts to support County regulation of non-member conduct on *fee* lands; and (2) The County did in fact, show off reservation impacts and the District Court has already balanced the regulatory interests of the two governments.

A. *New Mexico v. Mescalero Apache's* off-reservation impact analysis is not applicable.

The Ninth Circuit cited the case of *New Mexico v. Mescalero Apache*, 462 U.S. 342 (1983), as support for its conclusion that *Whiteside II* should be remanded for a balancing of County and Tribal regulatory interests and for a County showing of off-reservation impacts which would justify its zoning scheme. (County Pet. 15-A). The Ninth Circuit's reliance on *Mescalero* is misplaced. That case dealt with a state's attempt to regulate non-member hunting and fishing on reservation *trust lands* in the face of pervasive and explicit federal regulation of the same conduct. The distinction between fee lands and trust lands was not lost upon this Court in *Mescalero*:

> "Our decision in *Montana v. United States, supra*, does not resolve this question. Unlike this case, *Montana* concerned lands located within the reservation, but *not* owned by the Tribe or its members. We held that the Crow Tribe could not as a general matter regulate hunting and fishing on those lands. (citations omitted) But as to 'land belonging to the Tribe or held by the United States in trust for the Tribe, we readily agree(d) that a Tribe may prohibit nonmembers from hunting or fishing . . . (or) condition their entry by charging a fee or establish bag and creel limits.' 462 U.S. 330, 331 (1983) (emphasis in the original).

See also, *White Mountain Apache v. Bracker*, 448 U.S. 136 (1980) (dealing with non-member conduct on federally regulated trust lands). Indeed, in *Montana*, this court required no showing of off-reservation impacts to sustain state regulation of non-member hunting and fishing on reservation fee lands.

B. The County did show off-reservation impacts and the District Court has already balanced the regulatory interests of the two governments.

The Tribe and its amici assert that the County failed to demonstrate any off reservation impact which would

justify its regulation of open area fee lands. This is simply incorrect. There is strong evidence in the record concerning the importance of reservation fee lands to Yakima County's agricultural economy. See TR 416, 423; ex. 244; County BR 9-11. Preservation of agricultural land is the cornerstone of the County's zoning scheme as applied to the open area; it is necessary to preserve the County's overall health and welfare. The District Court found that Yakima County's open area zoning is "expressly designed to protect the County's agricultural land and other resources." County Pet. 30-A.

Finally, because the District Court found that the Tribe presented "no evidence whatsoever that could support the Tribe's assertion that county regulatory authority interfered with its political integrity, economic security, or health or welfare," there is simply no need for further balancing. County Pet. 51-A.

C. The Tribe misapprehends the State of Washington's land use regulatory scheme.

The Tribe asserts that various state land use laws which might be applicable to non-member owned fee land are not at issue in *Whiteside II*, specifically: Plats, Subdivisions, Dedications, RCW 58.17; Shoreline Management Act of 1971; RCW 90.58; and the State Environmental Policy Act, RCW 43.21C (RB 34). The Tribe concludes that the State's regulatory interest would have to be shown by off-reservation effects "as *could be done* for these legislative enactments". (RB 34). (emphasis added). The Tribe's admission that off-reservation impacts can be shown for these legislative enactments is particularly interesting since both *Whiteside I* and *II* arose in the context of the County's administration and implementation of the State Subdivision Law, RCW 58.17 and the State Environmental Policy Act, RCW 43.21C.

Moreover, the Tribe's assertion is a misapprehension of Washington State's regulatory scheme. The statutes

are enabling acts, and have no effect absent implementation by the County.

For example, pursuant to RCW 58.17 the County is required to regulate the subdivision of land within its boundaries. The adoption of development standards and local procedures is done by county ordinance.

The Shorelines Management Act provides for shared state and local responsibility. The County is required by its terms to adopt and administer a Master Program governing shoreline development which must be approved by the State Department of Ecology. RCW 90.58.080, .090. All shoreline permits issued by the County are reviewed by the Department of Ecology, and in the case of variances and conditional uses, must also be approved by that agency. RCW 90.58.140.[5]

Likewise, the County is bound by the State Environmental Policy Act to adopt and administer a local ordinance implementing the statute's guidelines. RCW 43.21C.120.

The state policies contained in these laws are all implemented at the county level. If the County has no regulatory authority on the reservation then, necessarily, these laws will have no application there.

V. *MONTANA* IS NOT INCONSISTENT WITH PRIOR COURT RULINGS.

The Tribe attacks this Court's ruling in *Montana* as "unprecedented" and urges that what it terms the

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[5] The Tribe asserts that the State Department of Ecology has recognized that the Shorelines Management Act does not apply to the reservation. (RB 34 n.19). Such is not the case. By its terms, the Yakima County Shorelines Master Program does apply to all shorelines of Ahtanum Creek and the Yakima River, including reservation lands. [Ex 214, p. 78, 83-4]. The County Master Program was approved by the Department of Ecology and is a chapter of the Washington Administrative Code, WAC 172-19-470. As indicated by the record, the County has issued permits for reservation fee lands. [WS II Tr. 496].

"Mazurie-Wheeler-Colville" view of tribal sovereignty should be adopted. This Court's decision in *Montana* is not inconsistent with any of these cases.

Washington v. Colville Tribes, 447 U.S. 134 (1980), held that the "power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status." 477 U.S. 152. The *Colville* case is inapposite to the cases at bar. None of the parties before this court challenge the Tribe's ability to regulate trust lands or transactions occurring on those lands.

The Tribe's assertion that the case of *United States v. Wheeler*, 435 U.S. 313 (1978) is somehow inconsistent with this Court's holding in *Montana* is puzzling. The *Montana* court relied on *Wheeler* in its discussion of the concept of inherent tribal sovereignty. 450 U.S. 563-564. *Wheeler* is cited for the proposition that there has been an implicit divestiture of inherent sovereignty in those areas involving relations between the Tribe and non-members. 450 U.S. 564. The "*Wheeler*" test and the "*Montana*" test are identical.

U.S. v. *Mazurie*, 419 U.S. 544 (1975), involved Tribal regulation of a non-Indian owned bar doing business with Indians on the reservation. Such regulation was explicitly authorized by Congress pursuant to 18 U.S.C. 1161 since the bar was not located in a "non-Indian community". 419 U.S. 553. The Court cited *Williams v. Lee*, 358 U.S. 217 (1959), in holding that the bar owner's inability to participate in tribal government did not preclude the regulation since the regulated conduct occurred on the reservation and involved transactions with Indians. 419 U.S. 558. *Montana*, also citing *Williams v. Lee*, specifically recognized this type of consensual relationship as subject to tribal jurisdiction. 450 U.S. 565.

VI. CONCLUSION

For the foregoing reasons, and those the County has previously briefed to this Court, this Court should grant the relief requested by the County in its opening brief.

Respectfully submitted on December 5, 1988.

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